92-1250

NO.

Supreme Court, U.S.
FILED
JAN 12 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

CONCERNED CITIZENS FOR NELLIE'S CAVE COMMUNITY, INC., A VIRGINIA CORPORATION

Petitioner

V.

HENRY F. JABLONSKI, ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF AND APPENDIX OF THE PETITIONER

SA'AD EL-AMIN,
Counsel of Record
EL-AMIN & CRAWFORD, P.C.
4221 Chamberlayne Avenue
Richmond, Virginia 23227
(804) 264-2375

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in granting a motion to dismiss the appeal because the notice of appeal was not timely filed.

2. Whether the Court of Appeals erred in denying petitioner's motion for attorney's fees and costs.

DESIGNATION OF PARTIES

The Concerned Citizens for Nellie's Cave Community, Inc., hereafter referred to as "Concerned Citizens" is a non-profit corporation organized under the laws of the State of Virginia.

Concerned Citizens is a biracial organization. Some of its members are African-Americans, who either own real property contiguous to the Road or who reside in the Nellie's Cave community.

Some of Concerned Citizen's members are and will continue to be negatively affected by traffic and other incidents in respect to the use of the Road as a connector between the Town of Blacksburg and State Route 723 in Ellett Valley which is in Montgomery County.

BEST AVAILABLE COPY

Tom Howze's cause of action arises in Count III of this amended complaint because he attended a Board of Supervisor's meeting on January 27, 1990 and was deprived of his First Amendment rights as is more specifically alleged in Count III.

Aubrey Mills' and Ida Mills McDonald's causes of action arise in Counts I and II of this amended complaint because they are African-Americans who own real property contiguous to the Road.

The defendants are white. Each is a duly elected member of the Board of Supervisors for Montgomery County.

Each defendant was an incumbent member of the Board at all times relevant herein.

BEST AVAILABLE COPY

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TABLE OF AUTHORITIES

Rule 4(a)(1), Federal Rules of Appellate Procedure

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1992

NO._____

CONCERNED CITIZENS FOR NELLIE'S

CAVE COMMUNITY, INC., A VIRGINIA

CORPORATION

Appellant

V.

HENRY F. JABLONSKI, ET AL[1]

Appellees

PETITION FOR WRIT OF

CERTIORARI TO THE FOURTH CIRCUIT

COURT OF APPEALS

---

[1] There are seven appellees, Henry F. Jablonski, Joe C. Stewart, James L. Shotts, Ann L. Hess, Ira D. Long and George A. Gray, each of whom was sued individually and in their official capacities as members of the Board of Supervisors, Montgomery County, Virginia.

The Petitioner, Concerned Citizens for Nellie's Cave Community, Inc., a Virginia Corporation, petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The orders of the Fourth Circuit granting the motion to dismiss and denying the motion for attorney's fees and costs are appended to this petition in the Appendix.

JURISDICTION

Orders sought to be reviewed were dated October 14, 1992 and November 17, 1992.

This Court has jurisdiction to review the judgments by petition

for writ of certiorari pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 4(a)(1), Federal Rules of Appellate Procedure provides:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from;. . . . If a notice of appeal is mistakenly filed in the court of appeals the clerk of the court of appeal shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF THE CASE

On or about June 17, 1992, the United States District Court for the Western District of Virginia,

Roanoke Division, entered an Order granting summary judgment in favor of appellees. (App. 20)

Appellant prepared a notice of appeal of the June 17, 1992 order which was inadvertently mailed to the Clerk of the United States District Court for the Eastern District of Virginia, Richmond Division. This notice of appeal was marked received and filed on July 13, 1992, which was well within thirty days from the date of the entry of the judgment against appellant. (App. 35)

On or about July 13, 1992, the Richmond Clerk's Office notified appellant's counsel that the notice of appeal was improperly filed in the Eastern District and should

have been filed in the Clerk's Office in Roanoke. The Richmond clerk returned both the check and the notice of appeal to appellant's counsel.

A substituted notice of appeal was sent to the Clerk's Office in Roanoke. However, it was not received and filed until July 20, 1992.

Appellees' were fully aware that the notice of appeal was marked filed in Roanoke, when they received a copy of the docketing statement, which was mailed to appellees' counsel on July 30, 1992.

A briefing order was filed by the Court of Appeals on July 29, 1992, requiring appellant to file

its brief and appendix on September 8, 1992. (App. 22).

On or about September 1, 1992, counsel for appellant requested appellees' counsel to designate the contents of the joint appendix which was required to be filed on or about September 8, 1992. (App. 54) On or about September 2, 1992, counsel for appellees sent to counsel for appellant, by Federal Express, appellees' designations for the joint appendix, which consisted of over 200 pages. (App. 58)

On September 8, 1992, appellant timely filed the opening brief and joint appendix. On September 10, 1992 counsel for Appellees sent appellants' counsel

a letter stating, "upon reviewing your brief and other papers in this case, we have concluded that your client's appeal should be dismissed because it is untimely". (App. 61) This was the first time that opposing counsel indicated an intention to dismiss the appeal for lack of jurisdiction. On September 11, 1992, appellees filed their motion to dismiss the appeal for lack of jurisdiction.

On or about October 14, 1992, the Court of Appeals granted appellees' motion to dismiss the appeal. (App. 28)

On or about October 30, 1992, appellant filed a motion for costs and attorney's fees on the ground that appellees' counsel

delay in filing the motion to dismiss until after the brief and appendix were filed caused appellants to incur unnecessary costs and expenses; thus the costs and attorney's fees should be taxed against appellees for their failure to use due diligence in filing a motion to dismiss.

On November 17, 1992, the Court of Appeals entered an order denying the motion. (App. 30)

SUMMARY OF ARGUMENT

The filing of the notice of appeal in the clerk's office of the United States District Court of the Eastern District of Virginia, Richmond Division, was a timely filing under Rule 4(a)(1) of the Federal Rules of Appellate

Procedure.

The delay by appellees in filing the motion to dismiss until after the brief and appendix were filed was ample reason for the Court of Appeals to have granted appellant's motion to have the costs and attorney's fees taxed against appellees.

ARGUMENT

A. THE NOTICE OF APPEAL WAS TIMELY FILED.

The filing of the notice of appeal on July 13, 1992 in the Clerk's office in the United States District Court in Richmond, was sufficient to confer jurisdiction on the Court of Appeals over the appeal because, Rule 4(a)(1) of the Federal Rules of Appellate

Procedure provides that a notice of appeal "shall be filed with the Clerk of the District Court within thirty days after the date of entry of the judgment or order appealed from...".

Appellants clearly complied with the spirit and letter of the rule. The fact that it was inadvertently filed in the wrong Clerk's office, should not be a basis for dismissal of the appeal. In fact, the Rule provides for timely filing if the notice of appeal "is mistakenly filed in the Court of Appeals...".[2]

B. **THE MOTION FOR COSTS AND**

---

[2] Appellant could find no reported cases where the notice of appeal was filed in the manner in the instant case, thus this appears to be a case of first impression.

ATTORNEY'S FEES SHOULD HAVE BEEN GRANTED.

Appellees's counsel knew or should have known as early as July 30, 1992, of the date that the notice of appeal was filed in the clerk's office of the trial Court, because the date of filing was clearly set forth in both the docketing statement and in the Clerk's transmittal sheet, both of which were sent to counsel for Appellees. (App. 43)

Appellant's counsel was put to considerable time and expense in researching and preparing the opening brief and the joint appendix. All of the time and expense could and should have been avoided if counsel for appellees

had been diligent in filing its motion to dismiss prior to the date the appellant was required to file its brief and joint appendix.

Counsel for appellees had a duty to bring to the Court's attention this issue at the earliest possible time. Because the record is clear that counsel for appellees was dilatory in raising the timeliness of the filing of the notice of appeal, the Court of Appeals erred in denying the motion to dismiss.

REASONS FOR GRANTING THIS PETITION

The Court should grant this petition because the Court of Appeals has by dismissing the appeal, elevated form over substance. The dismissal of the

appeal because the notice of appeal was filed in the clerk's office of a district court other than the court which entered the order is both harsh and draconian.[3] As such, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

In respect to the denial of the motion for costs and attorney's fees, suffice it to say that the Court of Appeals has now made it

---

[3] It is interesting to note that had the notice of appeal been filed in the clerk's office of district court which was not the district court which entered the order, but was within the same division, the notice would have been deemed timely filed.

possible for attorneys to engage, with impunity, in deliberate, dilatory tactics which are designed to exact a monetary toll on opponents, which also departs from the accepted and usual course of judicial proceedings calling for this Court to exercise its power of supervision.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

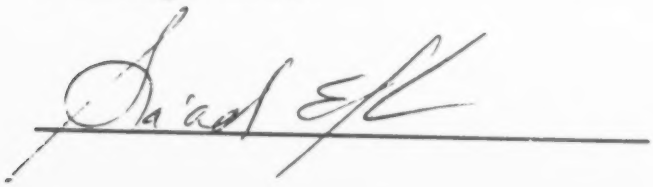
CONCERNED CITIZENS FOR
NELLIE'S CAVE
COMMUNITY, INC., A
VIRGINIA CORPORATION,
et al.

BY _____
Of Counsel

Sa'ad El-Amin, Esquire
Counsel of Record
El-Amin & Crawford, P.C.
4221 Chamberlayne Avenue
Richmond, Virginia 23227
(804) 264-2375

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Writ of Certiorari was mailed to W. Fain Rutherford, WOODS, ROGERS & HAZLEGOVE, P.O. Box 14125, Roanoke, Virginia 24038-4125, counsel for the appellees this 12th day of January, 1993.



UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF

VIRGINIA ROANOKE DIVISION

CONCERNED CITIZENS FOR

NELLIE'S CAVE COMMUNITY,

INC., et al.

Plaintiffs,

Civil Action No. 91-0595-R

v. **FINAL ORDER**

HENRY F. JABLONSKI,

et al.,

By: Hon. James C. Turk,

Chief U.S. District

Judge

Defendants.

In accordance with the

Memorandum Opinion entered this

day, it is hereby

ADJUDGED AND ORDERED

that Defendants' Motion for Summary Judgment is hereby **GRANTED**; however, any pendent state law claims in this matter are dismissed without prejudice.

The Clerk of the Court is directed to strike this matter from the active docket of the Court and to send certified copies to all parties of record.

Enter: this 17th day of June, 1992.

Chief U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

July 29, 1992

92-1850 Concernced Citizens v. Jablonski

BRIEFING ORDER-CIVIL CASE

Briefs and the appendix shall be served and filed within the time provided in the following schedule:

Appellant's brief/Appendix	9/8/92,
Appellee's brief	30 days after service of brief of appellant,
Reply brief(if any)	14 days after service of brief of appellee,

Cases are normally argued at

the first court session after completion of the briefing schedule. Delay may occur during the early fall term (October and November) due to the accumulation of cases in the summer when the court is not sitting in regular sessions. Appeals may be screeded fromthe argument calendar pursuant to Local Rule 34(a). Parties will receive approximately 30 days' notice of oral argument. When your case is tentatively calendared you will be given written notice and will have only 10 days fromthe date of written notification to file any motion, request or information which may affect argument, such as motions for decisions on briefs, voluntary dismissal of continuance

of argument.

Counsel are remineded that failure of the appellant to timely file a brief will cause the Court to initiate the process for dismissing a case under Local Rule 45, impose discipline pursuant to I.O.P. 46.6 or both. Failure of the appellee to timely file a brief may result in the loss of the right to be heard at oral argument and in the imposition of discipline pursuant to I.O.P. 46.6.

cc: Sa'ad El-Amin

Daniel Frank Layman, Jr.

William Fain Rutherford Jr.

Randy V. Cargill

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES COURTHOUSE

TENTH & MAIN STREETS

RICHMOND, VIRGINIA 23219

BERT M. MONTAGUE
CLERK

TELEPHONE
(804) 771-2213

September 14, 1992

Sa'ad El-Amin, Esq.
EL-AMIN & CRAWFORD
4221 Chamberlayne Avenue
Richmond, VA 23227

Daniel Frank Layman Jr., Esq.
WOODS, ROGERS & HAZELGROVE
Dominion Tower
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038

William Fain Rutherford Jr., Esq.
WOODS, ROGERS & HAZELGROVE
Dominion Tower
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038

Randy V. Cargill, Esq.
WOODS, ROGERS & HAZELGROVE
Dominion Tower
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038

Re: 92-1850 Concerned Citizens v. Jablonski
CA-91-595-R

Dear Counsel:

The appellees' motion to dismiss for lack of jurisdiction

was filed in this office on September 14, 1992. The appellants must file a response to the motion in the clerk's office on or before September 21, 1992, even if there is no objection.

Yours truly,

BERT M. MONTAGUE
Clerk

/s/ Shirley J. Beasley
By:_____
Deputy Clerk

FILED: October 14, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-1850

(CA-91-595-R)

CONCERNED CITIZENS FOR NELLIES'S CAVE COMMUNITY; TOM HOWZE; AUBREY MILLS; IDA MILLS MCDONALD,

Plaintiffs - Appellants,

versus

HENRY F. JABLONSKI; JOE C. STEWART; JAMES L. SHOTTS; ANN L. HESS; IRA D. LONG; GEORGE A. GRAY, Each of whom is sued individually an din his/her official capacity as a member of the Board of Supervisors, Montgomery
County, Virginia,

Defendants - Appellees.

ORDER

Appellees have filed a motion to dismiss and appellants have filed a response in opposition to the motion.

The Court grants appellees' motion to dismiss this case.

Entered at the direction of Judge Hall with the concurrence of Chief Judge Ervin and Judge Sprouse.

For the Court

/s/ Bert M. Montague

Clerk

FILED November 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-1850

(CA-91-595-R)

CONCERNED CITIZENS FOR NELLIE'S CAVE COMMUNITY; TOM HOWZE; AUBREY MILLS; IDA MILLS MCDONALD,

Plaintiffs - Appellants,

versus

HENRY F. JABLONSKI; JOE C. STEWARD; JAMES L. SHOTTS; ANN L. HESS; IRA D. LONG; GEORGE A. GRAY, Each of whom is sued individually and in his/her official capacity as a member of the Board of Supervisors, Montgomery County, Virginia,

Defendant - Appellees.

ORDER

Appellants have filed a motion for costs and attorney's fees and appellees have filed a response in opposition to the motion for costs and attorney's fees.

The Court denies appellants' motion for costs and attorney's fees and appellees' request for cost in this case.

Entered at the direction of Judge Hall with the concurrence of Chief Judge Ervin and Judge Sprouse.

For the Court

/s/ Bert M. Montague

Clerk

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: July 13th, 1992

REPLY TO
ATTN OF: Louis Neal, Clerk's Office U.S. District Court

SUBJECT: RE: Concerned Citizens for Nellie's Cave Community, Inc. v.

Jablonski, et al,

TO: Sa'ad El-Amin, Esquire
El-Amin & Crawford
4221 Chamberlayne Avenue
Richmond, VA 23227

Enclosed you will find your Notice of Appeal in the above matter as well as a check tendered by the Concerned Citizens for Nellie's Cave Community, Inc. made payable to Clerk, U.S. Court of Appeals in the sum of $105.00.

This notice of appeal is for the above case which is pending in the Roanoke Division of the United States District Court for the Western District of Virginia and should be filed in Roanoke. The check should be made payable to Clerk, U.S. District Court.

Since you filed this notice with our office we did not notice the error until it had been processed for docketing. In 1991 both the Roanoke and Richmond civil cases used R at the end of their civil action numbers. Our office no longer does this.

Please contact our office if you have any questions regarding this matter.

cc; miscelleanous file

Filed: July 13, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA

Roanoke Division

CONCERNED CITIZENS FOR
NELLIE'S CAVE COMMUNITY, INC.,
A VIRGINIA CORPORATION
and
TOM HOWZE,
AUBREY MILLS, and
IDA MILLS MCDONALD,

Plaintiffs,

v. Civil Action No. 91-0595-R

HENRY F. JABLONSKI,
JOE C. STEWART,
JAMES L. SHOTTS,
ANN L. HESS,

IRA D. LONG, and
GEORGE A. GRAY, Each of whom is sued individually and in his/her official capacity as a member of the Board of Supervisors, Montgomery County Virginia,

Defendants.

NOTICE OF APPEAL

COME NOW, the plaintiffs, by counsel, and hereby give notice of appeal to the United States Court of Appeals for the Fourth Circuit from a June 17, 1992 final order granting Defendants' Motion for Summary Judgment, and any pendent state law claims dismissed without prejudice.

Respectfully submitted,

CONCERNED CITIZENS FOR
NELLIE'S CAVE COMMUNITY,
INC., A VIRGINIA
CORPORATION, and
TOM HOWZE,
AUBREY MILLS, and
IDA MILLS MCDONALD

By_____
Of Counsel

Sa'ad El-Amin, Esquire
El-Amin & Crawford, P.C.
4221 Chamberlayne Avenue
Richmond, Virginia 23227
(804) 264-2375
VSB# 5506

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was

mailed to Daniel F. Layman, Jr., W. Fain Rutherford, Randy V. Cargill, WOODS, ROGERS & HAZLEGOVE, P.O. Box 14125, Roanoke, Virginia 24038-4125, counsel for the defendants, and to the Clerk of the United States Court of Appeals on this 10th day of July, 1992.

Filed: July 20, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF

VIRGINIA

Roanoke Division

CONCERNED CITIZENS FOR
NELLIE'S CAVE COMMUNITY, INC.,
A VIRGINIA CORPORATION
and
TOM HOWZE,
AUBREY MILLS, and
IDA MILLS MCDONALD,

Plaintiffs,

v. Civil Action No. 91-0595-R

HENRY F. JABLONSKI,
JOE C. STEWART,

JAMES L. SHOTTS,

ANN L. HESS,

IRA D. LONG, and

GEORGE A. GRAY, Each of whom is sued individually and in his/her official capacity as a member of the Board of Supervisors, Montgomery County Virginia,

Defendants.

NOTICE OF APPEAL

COME NOW, the plaintiffs, by counsel, and hereby give notice of appeal to the United States Court of Appeals for the Fourth Circuit from a June 17, 1992 final order granting Defendants' Motion for Summary Judgment, and any pendent state law claims dismissed without

prejudice.

Respectfully submitted,

CONCERNED CITIZENS FOR
NELLIE'S CAVE COMMUNITY,
INC., A VIRGINIA
CORPORATION, and
TOM HOWZE,
AUBREY MILLS, and
IDA MILLS MCDONALD

By_____
Of Counsel

Sa'ad El-Amin, Esquire
El-Amin & Crawford, P.C.
4221 Chamberlayne Avenue
Richmond, Virginia 23227
(804) 264-2375
VSB# 5506

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was mailed to Daniel F. Layman, Jr., W. Fain Rutherford, Randy V. Cargill, WOODS, ROGERS & HAZLEGOVE, P.O. Box 14125, Roanoke, Virginia 24038-4125, counsel for the defendants, and to the Clerk of the United States Court of Appeals on this 10th day of July, 1992.

_____

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Tenth & Main Streets

Richmond, Virginia 23219

DOCKETING STATEMENT

Caption of Case 4CCA Docket No._

_____ Type of Action

Concerned Citizens for Nellies Cave Community, Inc. A Virginia Corp.

__X__ Civil

____Criminal

and

___ Cross Appeal

Tom Howze, Aubrey Mills, and Ida Mills McDonald

v.

Henry Jablonski, et al.

District Western

Judge James C. Turk

District Court Docket Number 91-0595-R

Statute or other authority establishing jurisdiction in the:

District Court 28 U.S.C. §1343,2201 and 2202; 42 U.S.C. §1981, 1982, 1983, and 1988; First, Ninth and Fourteenth Amendments to the Constitution of the United States

Court of Appeals Rule 4(a) FRAP

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from

June 17, 1992

2. Date this notice of appeal filed July 20, 1992

If cross appeal, date first notice of appeal filed

3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b)

N/A

4. Date of entry of order deciding above post-judgment motion N/A

5. Filing date of any motion to extend time under FRAP 4(a)(5) or 4(b) N/A

Time extended to

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits? (X)yes ( )no

2. If no, a) Did the district court order entry of judgment as to less than all claims or all parties pursuant to FRCP 54(b)? ( )yes ( )no

b) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? ( )yes ( )no

If yes, explain_____

(Criminal only)

3. Has the defendant been convicted? ( )yes ( )no

4. Has a sentence been imposed? ( )yes ( )no

5. Is the defendant incarcerated? ( )yes ( )no

C. Has this case previously been appealed? ( )yes (X)no

If yes, give the case name, docket number and disposition of each prior appeal on a separate sheet.

D. Are any related cases or cases raising related issues pending in this court, any district court of this circuit, or the Supreme Court? ( )yes (X)no

If yes, cite the case and the manner in which it is related on a separate sheet.

E. State the nature of the suit, the relief sought, and the outcome below. Denial of Equal Protection, race discrimination;

plaintiff's seek declaratory, compensatory, and injunctive relief.

F. Issues to be raised on appeal. Attach one additional page if necessary. 1. Whether the District Court erred in holding that the statute of limitations had run prior to the date the Complaint was filed. 2. Whether the District Court erred in holding that res judicata barred the plaintiffs' claim of race discrimination in the condemnation of their property by the defendants.

G. Is settlement being discussed?

( )yes (X)no

H. Is disposition on motions, memoranda, or an abbreviated briefing schedule appropriate?

( )yes (X)no

I. Were there any in-court proceedings below? ( )yes (X)no

Is a transcript necessary for this appeal? ( )yes (X)no

If yes, is transcript already on file with district court?

( )yes ( )no If transcript is not already on file, attach copy 1 of transcript order. *

J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party Henry F. Jablonski, et al.

Attorney Randy V. Cargill, Daniel Layman & W. Fain

Rutherford

Address P.O. Box 14125,

Roanoke, Virginia 24038-4125

Telephone (703) 983-7600

2. Adverse party_____

_____

Attorney_____

_____

Address_____

_____

Telephone_____

_____

K. Appellant(s) Name Concerned Citizens for Nellie's Cave Community, Inc. A Virginia Corp. and Tom Howze, Aubrey Mills, and Ida Mills McDonald

_____

If incarcerated, give identification number_____

Address (If incarcerated, give institution address)

_____

_____

Telephone_____

L. Attorney or pro se litigant filing Docketing Statement. Will you be handling the appeal? (In criminal cases counsel below will handle the appeal unless relieved by this court.)

(X)yes ( )no

Name SA'AD EL-AMIN

_____(X)Attorney ( )Pro se

Firm EL-AMIN & CRAWFORD, P.C.

_____

Address 4221 Chamberlayne Avenue

Richmond, Virginia 23227 Telephone 264-2375

If this is a joint statement by multiple appellants, add the names and addresses of other appellants and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all appellants concur in this filing.

Signature_____

Date_____

ATTACH:

1. ADDITIONAL PAGES, IF ANY, CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.

2. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL

IS TAKEN.

3. COPY 1 OF THE TRANSCRIPT ORDER, IF ANY.

4. A CERTIFICATE OF SERVICE.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Docketing Statement was mailed postage prepaid to Randy V. Cargill, Esquire, P.O. Box 14125, Roanoke, Virginia 24038-4125, and the United States District Court 10th & Main Streets, Richmond, Virginia 23219 this 30th day of July, 1992.

EL-AMIN & CRAWFORD, P.C.

Attorneys at Law

Akuban (War Horn)

A Ghanian Summons to

Action

Phone (804) 264-2375

Fax (804) 264-2396

Sa'ad El-Amin

Beverly D. Crawford

4221 Chamberlayne Avenue

Richmond, Virginia 23227

September 1, 1992

Randy V. Cargill, Esquire

WOODS, ROGERS & HAZLEGROVE
Dominion Tower, Suite 1400
10 South Jefferson Street
P.O. Box 14125
Roanoke, Virginia 24038-4125

RE: Concerned Citizens for Nellie's Cave Community, Inc. v. Jablonski, et al.

Dear Mr. Cargill:

As you may be aware, appellant's opening Brief and Joint Appendix are required to be filed in the United States Court of Appeals for the Fourth Circuit on September 8, 1992. In order to prepare the joint appendix, I would appreciate your input as to what you want included in the joint

appendix.

The only issue which I will address on appeal is whether the District Court erred in finding that the statute of limitations ran against Concerned Citizens of Nellie's Cave as a representational plaintiff in this case.

I intend to include in the joint appendix the following:

The Amended Complaint; the Answer to the Amended Complaint; the Affidavits of Ida Mills McDonald and Aubrey Mills; the Final Order and Substitute Memorandum Opinion; the Notice of Appeal; and the Docketing Sheet.

I do not feel that it is necessary to include in the appendix either your motion to

dismiss, my brief in opposition, or your reply memorandum.

Please let me know at your earliest convenience whether you concur in the items which I intend to include in the appendix, or whether you wish to include other items.

Sincerely,

Sa'ad El-Amin

SEA/mdh

WOODS, ROGERS & HAZLEGROVE

Roanoke Office

Dominion Tower, Suite 1400

10 South Jefferson Street

P.O. Box 14125

Roanoke, Virginia 24038-4125

Telephone 703-983-7600

Facsimile 703-983-7711

Danville Office

P.O. Box 560, 530 Main Street

Danville, Virginia 24543-0560

Telephone 804-791-1350

Facsimile 804-799-3527

Writer's Direct Dial Telephone

(703) 983-7648

September 2, 1992

VIA FEDERAL EXPRESS

Sa'ad El-Amin, Esq.
El-Amin & Crawford, P.C.
4211 Chamberlin Avenue
Richmond, Virginia 23220

Re: Concerned Citizens for
Nellie's Community v.
Jablonski, et al.

Dear Mr. El-Amin:

In response to your letter of September 1, 1992, I have enclosed our contribution to the Joint Appendix. The materials consist of Exhibits A through P submitted to the Court in connection with our motion to dismiss.

Thank you for your courtesxy and cooperation.

Very truly yours,

WOODS, ROGERS & HAZLEGROVE

Randy V. Cargill

RVC:jm

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September 10, 1992

VIA FACSIMILE

Sa'ad El-Amin, Esq.
El-Amin & Crawford, P.C.
4211 Chamberlin Avenue
Richmond, Virginia 23220

Re: Concerned Citizens for Nellie's Community v. Jablonski, et al.

Dear Mr. El-Amin:

Upon reviewing your brief and other papers in this case, we have concluded that your client's appeal should be dismissed because it is untimely.

As I'm sure you, know, Rule 4(a) of the Federal Rules of

Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order. Your notice of appeal was filed with the district court on July 20, 1992, thirty-three days after the court's June 17 order. Moreover, you did not request an extension for filing the notice under Rule 4(a) (5) and your client may not now request and extension.

Unless you notify us by 10:00 a.m. tomorrow that you will dismiss your client's appeal, we will file a motion to dismiss based on failure to timely file a notice of appeal. We note that such failure deprives the appellate court of

jurisdiction. If we do not hear from you, we will assume that you will oppose our motion to dismiss and will notify the court.

Very truly yours,

WOODS, ROGERS & HAZLEGROVE

Randy V. Cargill

RVC:jm

M#77211

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

CONCERNED CITIZENS FOR NELLIE'S CAVE COMMUNITY, INC., a Virginia Corporation, TOM HOWZE, AUBREY MILLS, and IDA MILLS MCDONALD,

Appellants,

Record No. 92-1850

v.

HENRY F. JABLONSKI, JOE C. STEWARD, JAMES L. SHOTTS, ANN L. HESS, IRA D. LONG, and GEORGE A. GRAY, each of whom is sued individually

and in his/her official capacity as a member of the Board of Supervisors, Montgomery County, Virginia,

Appellees.

MOTION TO DISMISS

APPEAL FOR LACK OF JURISDICTION

Appellees respectfully move that this appeal be dismissed for lack of appellate jurisdiction because appellants failed to file a timely notice of appeal from the Final Order entered by the District Court. In support of their Motion to Dismiss, appellees state as follows:

1. On June 17, 1992, the District Court entered an Order

granting the Motion for Summary Judgment of the appellees, Henry F. Jablonski, Joe C. Stewart, James L. Shotts, Ann L. Hess, Ira D. Long and George A. Gray (Joint Appendix, p. 60, copy of Final Order attached hereto as Exhibit A).

2. On July 20, 1992, appellants, Concerned Citizens for Nellie's Cave Community, Tom Howze, Aubrey Mills and Ida Mills McDonald, filed a Notice of Appeal from the Order granting summary judgment (Joint Appendix, pp. 61-62;[4] Brief of Appellants at pp. 1-

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[4] Appellants included a copy of their Notice of appeal in the Joint Appendix which does not show the filing date. Attached hereto as Exhibit B is a copy of the Notice of Appeal showing that it was filed in the District Court on July 20, 1992.

2).

3. Appellants filed their Notice of Appeal more than thirty days from the date of entry of judgment against them and, therefore, the filing of the Notice of Appeal is untimely.

4. The absence of a timely filed notice of appeal deprives this Court of jurisdiction.

5. Counsel for appellants has been advised that appellees intended to file this Motion. Appellants will oppose the Motion.

WHEREFORE, appellees respectfully request that this Court dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

HENRY F. JABLONSKI, JOE C. STEWART, JAMES L. SHOTTS, ANN L. HESS, IRA D. LONG, and GEORGE A. GRAY

By:_____

Of Counsel

Daniel F. Layman, Jr., #14650
W. Fain Rutherford, #17944
Randy V. Cargill, #23811
WOODS, ROGERS & HAZLEGROVE
P.O. box 14125
Roanoke, Virginia 24038-4125
Phone: (703) 983-7600
Counsel for Defendants

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Motion to Dismiss Appeal for Lack of Jurisdiction was mailed to Sa'ad El-Amin, Esq., El-Amin & Crawford, P.C., 4221 Chamberlayne Avenue, Richmond, Virginia 23227, counsel for plaintiffs, this 11th day of September, 1992.

_____

Randy V. Cargill

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONCERNED CITIZENS FOR
NELLIE'S CAVE COMMUNITY, INC.,
A VIRGINIA CORPORATION
and
TOM HOWZE,
AUBREY MILLS, and
IDA MILLS MCDONALD,

Plaintiffs,

v. Record No. 92-1850

HENRY F. JABLONSKI,
JOE C. STEWART,
JAMES L. SHOTTS,
ANN L. HESS,
IRA D. LONG, and

GEORGE A. GRAY, Each of whom is sued individually and in his/her official capacity as a member of the Board of Supervisors, Montgomery County Virginia,

Defendants.

MOTION FOR COSTS AND ATTORNEY'S FEES AGAINST THE APPELLEES

COME NOW the appellants, by counsel, and move this Court pursuant to Rule 27(A) Federal Rules of Appellate Procedure to award them their costs and reasonable attorney's fees incurred in the prosecution of the appeal in

the above-styled matter. Appellants set forth as their reasons as follows:

1. On or about September 11, 1992, Appellees filed in this Court a Motion to Dismiss the Appeal for lack of jurisdiction. The motion brought to the attention of the Court the fact that the Notice of Appeal was filed more than thirty days from the date of entry of the final judgment.

2. Appellees knew or should have known as early as July 30, 1992, the date that the notice of appeal was filed because the date of filing was clearly set forth in both the docketing statement and in the Clerk's transmittal sheet, both of which were sent to counsel for

Appellees. (Exhibits A and B)

3. On or about September 1, 1992, counsel for appellants requested appellees' counsel to designate the contents of the joint appendix which was required to be filed on or about September 8, 1992.

4. On or about September 2, 1992, counsel for appellees sent to counsel for the appellants, by Federal Express, appellees' designations for the joint appendix, which consisted of over 200 pages. (Exhibit C)

5. On September 8, 1992, appellants timely filed the opening brief and joint appendix.

6. On September 10, 1992 counsel for Appellees sent

appellants' counsel a letter stating, "upon reviewing your brief and other papers in this case, we have concluded that your client's appeal should be dismissed because it is untimely".

7. This was the first time that opposing counsel indicated an intention to dismiss the appeal for lack of jurisdiction.

8. On September 11, 1992, appellees filed their motion to dismiss the appeal for lack of jurisdiction.

9. On October 14, 1992, this Court entered an order granting the appellee's motion to dismiss.

10. Appellants were put to considerable time and expense in researching and preparing the

opening brief, the joint appendix and the reply brief.

11. All of the time and expense could and should have been avoided if counsel for appellees had been diligent in filing the motion to dismiss when they received a copy of the docketing statement and the Clerk's transmittal sheet.

12. Counsel for appellees had a duty to bring to the Court's attention this issue at the earliest possible time.

13. It is clear that counsel for appellees was dilatory in raising the issue of whether the notice of appeal was timely filed.

14. Appellants expended the following in preparing the brief

and joint appendix:

$1,117.50 for legal research with the National Legal Research Group: (Exhibit D); $4,330.50 for attorney's fees associated with the preparation of the joint appendix,the opening brief, and reply brief;[5] $218.26 for the printing of the brief; and $4.80 for the mailing of the brief and appendix to Appellees:

15. The failure of Appellees to timely move the Court to dismiss the appeal caused appellants to

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5 Included in the attorney's fee request is the time expended by appellant's counsel in reviewing the brief of Appellees and preparing a draft of the reply brief. Appellants' reply brief was due to be filed on October 16, 1992. The Court's order dismissing the appeal was not received by appellants' counsel until October 15, 1992.

incur unnecessary costs and expenses which costs should be taxed against the Appellees for their failure to use due diligence in filing a motion to dismiss.

WHEREFORE, appellants respectfully request that this Court grant the motion and award appellants the costs and attorney's fees as requested herein.

Respectfully submitted,

Concerned Citizens for
Nellie's Cave Community, Inc.

By_____
Of Counsel

Sa'ad El-Amin, Esquire
El-Amin & Crawford, P.C.
4221 Chamberlayne Avenue
Richmond, Virginia 23227

(804) 264-2375

VSB# 5506

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Costs and Attorney's Fees Against Appellees was mailed, postage prepaid, to Randy Cargill, Esquire and W. Fain Rutherford, Esquire, Woods, Rogers & Hazlegrove, P.O. Box 14125, Roanoke, Virginia 24038-4125 this 30th day of October, 1992.

EL-AMIN & CRAWFORD, P.C.

TIME AND BILLING - NELLIE'S CAVE, CA-90-9

DATE	SERVICES RENDERED	TIME
8/24/92	Review file and prepare outling for brief-SEA	4.7
9/01/92	Prepare designation letter for appendix-SEA	1.0
9/02/92	Telephone conference with R. Cargill Re: Appendix - SEA	.5

9/03/92	Supplemental research - SEA	3.7
9/04/92	First draft of brief -SEA	6.1
9/04/92	Organize and paginate joint appendix-KH	1.9
9/07/92	Final draft of brief - SEA	3.9
10/07/92	Review Appellee's Brief - SEA	2.4
10/12/92	Prepare draft of Reply Brief - SEA	3.9
10/19/92	Prepare notice for fees and costs - SEA	2.1

SEA	28.3 @ $150.00	$4,245.00
KH	1.9 @ $ 45.00	85.00
		$4,330.50